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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

ARTHUR BALDWIN, SAMUEL CARTER,
WILLIAM CARTER and
JAMES CARTER,
Petitioners,

vs

THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PROCEEDINGS BELOW

This Petition for Writ of Certoriari is filed in order to obtain a review of People of the State of Mississippi vs. Arthur Baldwin et al, which was decided by the Supreme Court for the State of Mississippi on July 22, 1974. The case originated in the Circuit Court for the County of Tunica, Mississippi.

The Petitioners were charged and convicted of the crime of assault with intent to maim. The convictions were affirmed by order and opinion of the Supreme Court of Mississippi, which is unreported at this date.

JURISDICTION

The Order sought to be reviewed was entered on the 22nd day of July, 1974, by the Supreme Court for the State of Mississippi. The case involves the question of whether or not the State of Mississippi, acting through its agent and/or employees violated the constitutional rights of the Petitioners. Specifically, Petitioners' right to equal protection of the law and/or the privilege and immunity clauses of the Fourteenth Amendment to the Constitution of the United States. Further, Petitioners have claimed violations of their constitutional rights to due process of law and their rights to counsel.

This cause accordingly involves question of interpretation of the Constitution of the United States, thus giving the Supreme Court of the United States jurisdiction to resolve the controversy herein.

QUESTIONS PRESENTED AND ASSIGNMENT OF ERRORS

Question: Whether or not a State Statue which allows broad arrest discretion to Police Officers when such discretion is applied in a discriminatory manner against out-of-State residents, and when race is specifically shown to be a factor in the exercise of that discretion, violates the equal protection of the law and/or the privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States?

The Supreme Court answered "No".

Appellants contend that the Supreme Court erred in that regard.

Question: Whether or not the Petitioners' Constitutional Rights to due process of law and right to Counsel were violated by the Court when:

1. The Court ordered their trial continued without prior notice and over the objections of their counsel, beyond the normal evening adjournment time and into the early morning hours of the next day.
2. Their counsel was constrained to hurriedly prepare instructions to the jury on their behalf on the steps of the courthouse under street lights at night.
3. When their counsel is afforded a period of only fifteen minutes within which to prepare a closing argument covering a total of fifteen

hours of trial testimony and when their were two prosecutors participating in the trial of the cause who shared both the preparation and the giving of the state's closing argument—one opening and one closing?

The Supreme Court Answered "No".
Appellants contend that the Supreme Court erred in that regard.

STATEMENT OF FACTS

Petitioners are four (4) black natives of the State of Mississippi. Three (3) of the Defendants are brothers (Carters), and the other (Baldwin) a cousin of the three. All of the Petitioners at the time of the occurrence giving rise to this prosecution were residing in the City of Pontiac, Michigan, where they had lived for upwards of four (4) years.

Petitioners, in the company of their wives and children, had driven to Vicksburg, Mississippi, in two (2) cars in order to attend the funeral of a member of the family. On October 2, 1972, Petitioners were returning home to Michigan via Highway 61 North, when the car being driven by Petitioner, Arthur Baldwin, was stopped by Mississippi State Highway Patrolmen Roy Wiley Wooten, hereinafter referred to as Complainant. Complainant claimed that Petitioner Baldwin was exceeding the lawful speed limit of 65 miles per hour in that he was determined by radar equipment to have been traveling at the rate of 83 miles per hour.

Complainant testified that he was stationed in Tunica County on Highway No. 61 headed South approximately

one mile south of the County line when he observed the Petitioner, Arthur Baldwin's car as it proceeded north on Highway 61 exceeding the posted speed limit. The Complainant claims to have been using a radar device that is capable of clocking cars going in an opposite direction. Complainant testified that he then turned his vehicle around and stopped Petitioner, Arthur Baldwin's car by blue light signal before it had reached the DeSoto County Line. Petitioner Baldwin was requested by the Complainant to exhibit his driver's license. Upon complying with that request, Baldwin was asked to get into the patrol car. As soon as Baldwin was seated in the patrol car, Complaint announced that he was under arrest. (Page 41, Line 23, Appendix).

The car being driven by Samuel Carter also pulled over to the side of the road when Complainant signaled to the Baldwin vehicle to stop. All passengers remained in the car until Complainant and Petitioner Baldwin existed the patrol car.

Complainant claimed that during the course of the discussion about the issuance of the ticket in the patrol car, Petitioner Baldwin became "rude" and further asserted that he was not going to "any goddam jail". Complainant also stated that he became disturbed while in the patrol car over Petitioner Baldwin's refusal to address him by using "yes sir" and "no sir" as opposed to "yeah" and "naw". (Pages 42 and 43, bottom and top, Appendix).

Baldwin, however, claimed that the Complainant demanded that he call him "sir" and that his refusal to do so so angered the officer that he threatened to beat him and exclaimed "Well, I'm going to teach you how to say "yes sir', get out of this car, nigger". Page 51, Lines 16 through 23, Appendix).

Complainant and Petitioner Baldwin exited the patrol car simultaneously whereupon Complainant demanded that Baldwin place his hands on the patrol car preparatory to being searched. Baldwin placed his hands on the patrol car as requested by Complainant when, according to Baldwin's testimony, Complainant with his revolver drawn reiterated his threat to teach him how to say "sir" as follows, "I'm going to teach you nigger how to say 'sir' ". (Page 51, lines 16 through 23, Appendix).

Complainant, on the other hand, claimed that a tussle ensued when he drew his handcuffs. Complainant testified that Petitioner, Baldwin did obey his request to place his hands on the patrol car but that Baldwin charged him when he attempted to place his handcuffs on him. Complainant further claimed that the other three (3) Petitioners were standing around the car when Baldwin attacked him, and that they all assisted Baldwin in taking away his revolver and later beating him up.

Complainant testified that he drew his service revolver only after having been attacked by Baldwin and that the gun was wrestled away from him by all of the Petitioners acting in concert. Complainant further claimed that he was struck upon the head with the revolver by Petitioner Baldwin and also struck in the face many times. Complainant stated that all four (4) of the Petitioners were the authors of numerous blows to his body. He stated that he was kicked in the ribs many times, kicked in the groin and beaten by fists about the head and face.

Complainant also claimed that after Petitioner Baldwin had succeeded in taking his revolver (No. 19 357 Smith and Wesson Magnum) he pointed the gun to Complaint's head and attempted to fire. The gun did not fire because Complainant claimed that it was rendered inoperable by

the blow that he received to his head from it which bent the trigger guard into the trigger. He stated that Petitioner, Baldwin, at his request, took all of the bullets out of the revolver and threw it into the field across the road.

Complainant stated that for some unknown reason, after the gun had been tossed away, all of the Petitioners ceased their assault upon him and premitted him to get up from the ground. He claimed that after he had gotten up and started back to his patrol car, Petitioner Baldwin gave chase. Complainant claimed to have beaten Baldwin in a foot-race to the car of approximately twenty (20) yards. Complainant upon arriving at the car, locked the door, took his shotgun out, radioed for help and then exited the patrol car and demanded that all Petitioners lie on the ground. Petitioners James Carter and Arthur Baldwin ran up the road and Petitioner Samuel Carter fled across the road into a soybean field.

Complainant then turned the shotgun on William Carter and Mrs. Arthur Baldwin and demanded that the fleeing Petitioners return or the remaining persons would be shot. Petitioners Baldwin and James Carter returned, however, Petitioner, Samuel Carter remained hidden in the field.

It was established by competent medical testimony as well as testimony from the Complainant that Complainant sustained three lacerations of the head and forehead requiring a total of fifteen (15) sutures. The sutures were applied as follows: Six (6) to Complainant's head, six (6) to his forehead, and three (3) in his eyebrow (Page 50, lines 3-8, Appendix). There was no other evidence of injury sustained by Complainant whatsoever according to the medical testimony (Page 48, lines 7-15, Appendix).

All Petitioners denied, except Petitioner Baldwin, having struck Complainant. All Petitioners categorically denied

having kicked the Complainant. Petitioner Baldwin testified that he alone was involved with the Complainant in a tussle for the gun. He claimed that he grabbed the gun in order to avoid the execution of Complainant's announced threats. He stated that in struggling for the gun which he managed to raise above the Complainant's head, the officer was cut by the gunbutt as it was pulled down across his head and face. He emphatically claimed that there were no intentional blows whatever issued to the Complainant by anyone.

Complainant testified that while attempting to round up the fleeing Petitioners, that he found it necessary to strike Petitioner Arthur Baldwin upon the head with the butt of his shotgun. He claimed that such a blow was made necessary by Petitioner Baldwin's apparent desire to attack Officer Aubuchon who with other officers had then arrived to give assistance to Complainant (Page 41, lines 1-4, Appendix).

Complainant also testified that in the presence of a number of other officers, all of the Petitioners were made to lie on the ground. All were handcuffed including Petitioner Arthur Baldwin (Page 40, bottom lines, Appendix).

Other officers who testified at the trial including Officers, Fred Burchfield and Tommie Copous, stated that none of the Petitioners gave any officers any trouble at all while they were lying on the ground. (Pages 46-47 entire, Appendix).

A witness by the name of Geraldine Wheeler was called to testify for the prosecution. Her testimony contradicted

that of both the Complainant and all other police officer witnesses. She stated that she appeared as a voluntary witness without subpoena and testified that all of the Petitioners, while lying on the ground, jumped at the Complainant from time to time and that the Complainant never struck any of the Petitioners at any time. (Pages 44 and 45, Appendix).

All of the Petitioners testified that they were severely beaten by the arresting officer while on the ground. Petitioner Baldwin testified that he was kicked in the head, face and side by Complainant. He further stated that he was transported to the Tunica County Jail in a separate patrol car in the company of two officers, one of whom beat him continuously with a blackjack all the way to the jail. (Page 52 bottom, Appendix). Baldwin testified that he sustained a broken nose which required casting and plastic surgery. He stated that he was required to stay off from his employment for approximately two months as a result of injuries inflicted by the officers. Petitioner further claimed that when they arrived at the Tunica County Jail, they were stripped of all of their clothing and placed in cells naked. Their requests for medical treatment were not immediately honored.

PROCEDURAL STATEMENT OF FACTS

A preliminary examination in this cause was had on October 5, 1972, in the Justice of the Peace Court for Tunica County, Mississippi, during which time all Petitioners were represented by local counsel. All Petitioners were thereafter released on bond and returned to Pontiac, Michigan.

Petitioners were later served by mail with a written Order to appear for trial by the Clerk of the Tunica County Court for February 26, 1973, whereupon all Petitioners and their present counsel appeared at the Tunica County Courthouse for trial at 9:00 A.M., Monday February 26, 1973.

Counsel and the Petitioners were advised, upon their arrival at the Courthouse, that the matter could not proceed immediately to trial for the reason that a Grand Jury would have to be impaneled in order to secure an indictment against them. Counsel was also advised by the Court that because of the Grand Jury proceedings the earliest that the matter could be scheduled for trial would be Thursday, March 1, 1973.

An indictment was secured in this cause and filed with the Court on February 26, 1973. Counsel for the Petitioners then requested that the matter be set for trial at the earliest available date of March 1, 1973, for the reason that all parties had proceeded to Mississippi from Michigan in expectation of commencing trial on the 26th of February. Counsel further stated that preparations had been made to be away from his office for only one week. The Court granted Defense Counsel's request and set the matter for trial for March 1, 1973.

Prior to the selection of the jury, Counsel for the Petitioners offered to the Court a written Motion to Dismiss the indictment on the grounds that the conduct of the arresting police officer violated the Constitutional rights of all of the Petitioners specifically the Equal Protection and/or the Privileges and Immunities clauses of the Fourteenth Amendment to the Constitution of the United States, by allowing broad arrest discretion to police officials when such discretion operates only against out-of-state residents.

This Motion was summarily denied without argument by the Court in chambers.

Counsel for the Petitioners next moved orally to quash the indictment on the grounds that it was so vague that it was impossible to frame a defense to same. The Court, after having heard argument in that regard, denied Petitioners' Motion to Quash.

Counsel for the Petitioners objected to the Court having ordered the trial to continue beyond 6 P.M. to its conclusion at approximately 12:30 A.M. the following morning. Coupled with this objection was defense counsel's protest as to the manner in which instructions for the Petitioners had to be prepared. (On the Courthouse steps under the street light). (Page 53, Appendix). The Court responded to Counsel's objection regarding the instructions by indicating that the local Court rules required instructions to be filed within Twenty-four (24) hours of trial, and that he had waived the rule as a courtesy to Defense counsel. One of the prosecutors (Mr. Lee Graves) also stated, and Defense counsel concedes, that he attempted on the day before trial to reach Defense counsel by telephone in order to advise Counsel as to the local Court Rules regarding the filing of instructions (Page 54, Appendix).

The proceedings culminated at approximately 1:00 A.M., March 2, 1973, with the Court's sentencing of the Petitioners as follows:

Petitioner Arthur Baldwin	— Four (4) years in the State Penitentiary
Petitioner Samuel Carter	— Three (3) years in the State Penitentiary
Petitioner William Carter	— Three (3) years in the State Penitentiary
Petitioner James Carter	— Two years in the State Penitentiary

On the following day, Appeal Bonds were posted on behalf of all of the Petitioners and they were discharged on bond pending this appeal.

SUMMARY OF FACTS

Petitioners are Four (4) black natives of the State of Mississippi who have resided in the State of Michigan for upwards of 4 years.

All Petitioners, on October 2, 1972, in the Company of their wives and children were returning to Pontiac, Michigan in two cars from Vicksburg, Mississippi, where they had attended a funeral of a member of the family.

Petitioner Arthur Baldwin, while proceeding north on Highway 61 through Tunica, Mississippi, was stopped by Complainant Roy Wiley Wooten, a Mississippi Highway Patrolman, for speeding. Baldwin was asked to get into the patrol car and immediately upon doing so was placed under arrest by the Officer. After the arrest a verbal altercation developed between the Officer and Baldwin which culminated, according to Baldwin, in racial slurs being made to him and a threat and attempt by the officer to beat Baldwin.

The other Petitioners, Samuel Carter, William Carter and James Carter, who were traveling behind Baldwin in another car attempted to intercede and did in fact succeed in taking the gun away from the officer. The bullets were removed from the gun by the Petitioner and it was thrown into a nearby field. The officer was then let go whereupon he went to the patrol car, got his shot gun, called for help and proceeded to capture all the Petitioners, including their wives and children and administered severe beatings to all Petitioners before taking them to jail. During the struggle

the officer sustained three (3) cuts about his head and face. Petitioners were charged with assault with intent to maim.

Petitioners were tried in the Circuit Court for the County of Tunica, Mississippi, in one day. The trial commenced at 9:00 A.M., March 1, 1973, and concluded at approximately 1:00 A.M. the following morning. Counsel for Petitioners, a member of the Michigan Bar lodged numerous complaints and interposed many objections to the manner and circumstances surrounding Petitioners' trial. Complaints and objections were made by Defense counsel, *inter alia,* to the following situations:

1. Petitioners tried in one day, from 9:00 A.M. to 1:00 A.M. the following morning.
2. Defense counsel not afforded any time within which to prepare instructions to the jury.
3. Defense counsel not afforded sufficient time to prepare closing argument.

Petitioners were found guilty of assault with intent to maim and were immediately sentenced to Four (4) years, Three (3) years, Three (3) years and Two years, respectively, in Mississippi State Prison. All Petitioners are presently out on Appeal Bonds.

REASONS TO GRANT PETITION

QUESTION: WHETHER OR NOT A STATE STATUTE WHICH ALLOWS BROAD ARREST DISCRETION TO POLICE OFFICERS WHEN SUCH DISCRETION IS APPLIED IN A DISCRIMINATORY MANNER AGAINST OUT-OF-STATE RESIDENTS, AND WHEN RACE IS SPECIFICALLY SHOWN TO BE A FACTOR IN THE EXERCISE OF THAT DISCRETION, VIOLATES THE EQUAL PROTECTION OF THE LAW AND/OR THE PRIVILEGES AND IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court answered "No".
Appellants contend that the Supreme Court Erred in that regard.

Argument

It is well settled that in order to invalidate a statute, a Court must find one of two impermissible conditions present; (1) That the statute is based upon an unjustifiable standard; or (2) that a neutral statute has been applied "with an evil eye and an unequal hand" thus rendering it discriminatory in its application. Accordingly, a statute will not, per se, be declared void without an expressed basis of discrimination written into it. However, a law as administered may be declared void by virtue of its application and not in toto.

The facts of the instant case manifestly evidence conduct on the part of police officials that was impermissibly discriminatory on its face. The record of the cause indicates that broad discretion reposed in the arresting officer to take whatever action he chose in dealing with out-of-state residents; from the simple issuance of a traffic ticket

to the arrest and detention under handcuffs of an alleged out-of-state traffic offender.

The question as to whether to arrest or not to arrest an out-of-state motorist may be resolved by the arresting police officer without the imposition of standards. Thus the arresting officer here did not feel constrained during the course of the trial to explain why he admittedly on some occasions permitted out-of-state motorists who had allegedly committed traffic offenses to simply proceed on their way after the issuance of a ticket while by contrast summarily arresting the Petitioner Arthur Baldwin as soon as he was seated in the patrol car. (Page 41, line 23, appendix).

According to the record, the only events that occurred prior to the exercise of the officer's discretion in terms of whether to arrest or not to arrest Petitioner Baldwin were as follows:

1. Petitioner Baldwin stopped.
2. Petitioner Baldwin requested to exhibit driver's license.
3. Petitioner Baldwin requested to get into patrol car whereupon officer immediately announced the arrest of Petitioner Baldwin.

One is therefore left to wonder upon what basis the police officer exercised his discretion. That is to say, what standard did he employ in exercising his discretion as to the arrest. The obvious implication of the officer's conduct is that it constituted a discriminatory application of the statute against Petitioner Baldwin solely because of Baldwin's race.

The dialogue that occurred between the arresting officer and Baldwin was fret with racial overtones. The racial

significance of the confrontation was immediately apparent. Race obviously became the impermissible standard used by the officer in exercising his discretion. The officer's racially oriented posture is confirmed when consideration is given to his preoccupation with and dogged insistence that he be called "sir" by Petitioner Baldwin.

In the above-described context, the conduct of the officer can justly be described as a harassment of the Petitioner. Police officers should not be permitted to use their authority merely as a ploy to degrade those who subjectively irritate them. Harassment has been aptly described by legal scholars in the following terms:

> "Harassment is the imposition by the police acting under color of law of sanctions prior to conviction as a means of ultimate punishment, rather than as a device for the invocation of criminal proceedings . . . Harassment is generally of extremely low visibility, probably because the police ordinarily restrict such activity to persons who are unable to afford the cost of litigation, and who would, or think they would, command little respect even if they were to complain . . ." Goldstein, *Police Discretion not to invoke the Criminal Process,* 69 Yale Law Journal, Pages 543, 580-581 (1960).

The case at bar is not distinguishable from that discussion.

It should be further noted that a statute which allows a broad range of discretion to an arresting official is likely to be illegal because it operates on only part of the population (those out-of-state) and it allows for a standardless choice by the official that could deprive people of their Constitutional Rights. Thus the phenomena of selective enforcement is introduced. The Supreme Court of the United States although having spoken with great definition on the

subject of selective enforcement in *Oyler* v *Doles*, 368 U.S. 448, 456 (1962) specifically excepted the introjection of race as permissible standard. The Court stated in *Oyler, supra,*

> "Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it is not stated that the selection was deliberately based upon an unjustifiable standard such as *race,* religion, or other arbitrary classification." (Emphasis supplied.)

Hence, even though the statute itself may be saved upon the grounds that it does not clearly make race, religion or other arbitrary classifications a standard for enforcement, the introjection of these prohibited criteria by police officials in applying the statute renders it invalid in its effect.

Petitioners here claim that there exists an independent right to non-discriminatory penal enforcement; thus any statute which allows a broad based discretion that may ultimately be used by police officials in an unjust manner is ipso facto unconstitutional.

Whenever intentional discriminatory enforcement is shown, courts have held that the Equal Protection clause of the Fourteenth Amenedment has been violated. Thus in *Wade* v *City and County of San Francisco,* 82 Cal. App. 2d 337; 186 p 2d 181 (1947), the Court dismissed charges of illegal street magazine selling because of obvious discriminatory enforcement by police.

A forthright assertion of the complete invalidity of the statute upon which the arresting officer's conduct was based is not without cogency, particularly when consideration is given to the language of the Supreme Court in the case of *Baxstrom* v *Herold,* 383 U.S. 107, 111 (1966).

There the Court said:

> ". . . equal protection does not require that all persons be dealt with identically but it does require that a distinction made have some relevance to the purpose for which the classification is made."

In *Baxstrom, supra,* it was found that equal protection was denied by a statutory procedure by which a person could be civilly committed at the end of a prison sentence without the jury trial necessary for committment of those not formerly in prison. The Court was interested in the right denied against the claim of an over-riding interest in depriving the person of such right. The principle was used by the Wisconsin Court in State ex. rel. *Garner* v *Gray,* 55 Wis. 2d 574, 201 N.W. 2d 163 (1972). In that case, the prisoner was wanted for a crime in Illinois when he was arrested in Wisconsin. Illinois sought extradition under a statute that did not allow a prisoner to have notice of the custody request and of his rights in relation to that request. Another statute allowed such full range of rights. The Court held that no rational basis was obvious for the distinction allowed between the statutes as it related to the choice of out-of-state applicants. Impliedly the Court held that the right to notice and a pre-extradition hearing were more vital than the state's rights to choose which statute to utilize.

Accordingly, Petitioners contend here that their rights, and those of other interstate travelers, are in jeopardy by the bifurcated levels of discretion allowed by statute. Thus like in *Garner, supra,* Petitioners' real constitutional rights especially privileges and immunities under the Fourteenth Amendment are and have been at the mercy of the State. The state here can choose as in *Garner, supra,* whether to apply a strict or lenient level of punishment.

Such a choice could have no rational basis to a state need, especially in view of the uniform traffic laws which would make a ticket received in one state still due even though the recipient has crossed state lines. Against this can be placed only a state's concern for immediate payment. Such a policy consideration or desire for efficientcy, if you please, has been denied by the Supreme Court. See *Stanley* v *Illinois*, 405 U.S. 645 (1971).

It is Petitioners' further contention that their fundamental rights to travel freely have been hindered by the subject reasonless statute. Although the Petitioners have not been expressly forbidden to travel upon Mississippi roads, they do so, as do all out-of-state travellers at an obvious risk of incarceration. It should be noted that Mississippi is not alone in this regard, such statutes being the rule as opposed to the exception in most states. No compelling state interest, however, could be brought forward to meet the fundamental interest test presented. The principles are well set out in *Eggert* v *Seattle*, 81 Wash. 2d 840, 550 P. 2d 80 (1973), in which a city charter provision, which granted preference in employment in certain positions to city residents and which allowed only residents of a certain duration to compete for civil service positions, was held unconstitutional. The right to travel was, based upon Supreme Court opinions, deemed *"fundamental"*. The standard to be applied was a very relaxed one, thus making it nearly impossible for a governing body to argue that a restrictive statute was rational or the result of a compelling interest:

> The decision in [*Dunn* v *Blumstein*, 405 U.S. 330 (1972)] makes clear that the right to travel is, a fundamental right, violated by classifications which penalize, not actually deter the right to travel, and actual deterrence was not a factor to be considered in deciding whether a penalty was imposed.

Here the Petitiners claim that travel in the State of Mississippi or any other state in which broad and unbridled discretion is afforded police officers, is naturally restricted by the constantly threatened loss of liberty. Such a threat is even more pronounced in areas in which racial polarization and hostility is a perceptible vestigial remain of an earlier way of life that oppressed and degraded certain classes of people because of racial considerations. The extent to which such was the rule in a given state would operate directly upon the minds of the persons within the class (black) and consequently greatly deter their movement within the state. Such a situation is obviously defiant of the rule and rationale enunciated in *Dunn, supra,* and *Eggert, supra.*

This writer is mindful of the fact that the test of a valid law is not that it seek to treat everyone exactly the same. It is however Petitioners' contention that the law must treat those charged with at least the minimum of constitutionally guaranteed rights. The Petitioners have a right to travel, a right not to be denied freedom arbitrarily and a right not to be discriminated against because of personal characteristics. No state can validly claim that their resources are channeled toward arresting only out-of-state traffic violators and as such, any action taken toward that end would be rational action.

The arrest of the Petitioners and their subsequent and continuous beatings was in actuality a form of summary punishment for the violation of the speeding laws. The pre-trial punishment that was meted out to these Petitioners was obviously based solely upon the fact of their color. The arresting police officer's determination of impropriety as to Petitioner Baldwin's refusal to address him as "sir" is profoundly illustrative of a mentality and perspective that makes such judgments solely within the context of the color of the man's skin.

ASSIGNMENT OF ERROR NUMBER TWO

QUESTION: WHETHER OR NOT THE PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND RIGHT TO COUNSEL WERE VIOLATED BY THE COURT:

1. ORDERING THEIR TRIAL CONTINUED WITHOUT PRIOR NOTICE AND OVER THE OBJECTIONS OF THEIR COUNSEL BEYOND THE NORMAL EVENING ADJOURNMENT TIME AND INTO THE EARLY MORNING HOURS OF THE NEXT DAY.

2. BY THE FACT THAT THEIR COUNSEL WAS CONSTRAINED TO HURRIEDLY PREPARE INSTRUCTIONS TO THE JURY ON THEIR BEHALF ON THE STEPS OF THE COURTHOUSE UNDER STREET LIGHTS AT NIGHT.

3. WHEN THEIR COUNSEL IS AFFORDED A PERIOD OF ONLY FIFTEEN MINUTES WITHIN WHICH TO PREPARE A CLOSING ARGUMENT COVERING A TOTAL OF FIFTEEN HOURS OF TRIAL TESTIMONY AND WHEN THERE WERE TWO PROSECUTORS PARTICIPATING IN THE TRIAL OF THE CAUSE WHO SHARED BOTH THE PREPARATION AND THE GIVING OF THE STATE'S CLOSING ARGUMENT—ONE OPENING AND ONE CLOSING.

The Supreme Court answered "No".
Appellants contend that the Supreme Court erred in that regard.

Argument

It should be noted at the outset of this argument that counsel for the Petitioners does not charge the Trial Court or any of its personnel, including the two prosecutors, but

specifically excepting the bailiff, with any malice in causing the problems complained of. It was unfortunate however that the constitutional rights of the Petitioners were tacitly subordinated to the interest of preserving the Court's time.

Fundamental notions of justice require that some consideration be given to Defense counsel in the preparation and trial of his clients' cause. (*Martin* v *Commonwealth of Virginia*, 365 F. 2d 549 (1966)). No such consideration, however, was afforded to Petitioners here.

This cause commenced at 9:00 A.M., on March 1, 1973, and ended at approximately 1:00 A.M., March 2, 1973, with the sentencing of Petitioners. There was a break of approximately one hour and fifteen minutes for lunch and another break of approximately one hour and a half for dinner. Just prior to the dinner break, Counsel for the Petitioners was advised off the record, (at 6:00 P.M.) that the case would have to proceed to conclusion regardless as to the time that it took or Defense Counsel's plans. The Court further advised at that time that the Petitioners' instructions to the jury would have to be furnished to the Court immediately upon returning from the dinner break.

The Court's announcement as to the continuation of the trial and the submission of instructions obviously took Counsel for the Petitioners completely by surprise. No preparations had been made by Counsel for such an extensive one-day proceeding. Many pre-arranged trial strategies had to be abandoned. An immediate decision had to be made as to whether all or any of the Petitioners should take the stand. Once the decision was made, there was no time for counsel to consult with Petitioners in order to prepare them for cross examination.

The instructions to the jury that were prepared by Defense Counsel were literally prepared on the steps of the Courthouse in the dark with only the illumination of the exterior Courthouse lights and the street lights, and in the midst of hostile persons who were making derogatory and threatening remarks to Counsel. Counsel had left the Courthouse during the dinner break only momentarily in order to get a sandwich. Counsel's request to gain entry into the Courthouse upon his return was denied by the Court bailiff. (Page 53, Appendix).

The atmosphere in which the trial proceeded was immensely hostile. Although none of the hostility could in any way be directly attributable to the Court or the prosecuting attorneys, it nonetheless was there and the court personnel were apparently powerless to do anything about it. It however should be said that everyone connected with the Court itself, with the exception of the bailiff, did their utmost to mitigate the hostile atmosphere, nonetheless, the situation was so pronounced that it was necessary for the Sheriff, acting on request of the FBI, to provide armed escorts out of the City of Tunica to the Tennessee State line at approximately 2:30 A.M., to Defense Counsel.

This writer is an experienced trial counsel who diligently attempted to bring to bear all of his experience and expertise in the defense of the accused. There is no question, however, but that the Petitioners were deprived of the full benefits of their Counsel's talents because of intrinsic and extrinsic circumstances that directly militated against their having received a fair trial.

SUMMARY

The Supreme Court of Mississippi, in its opinion, apparently concedes the fact that Petitioner Arthur Baldwin was placed under arrest by the Complainant Officer before any altercation had developed between them. Thus the question of whether or not Baldwin's arrest itself constituted an impermissible discrimination against him by the arresting officer should not, and cannot be determined by the events occurring after Baldwin's arrest.

The Supreme Court, however, has nonetheless claimed that Baldwin's arrest was pursuant to proper standards, and was without racial inspiration. Assuming arguendo that race was not a factor, the arrest of Baldwin was nonetheless arbitrary since the record is silent as to any permissible reason for the arresting officer to have arrested Baldwin while admittedly not having arrested other interstate travelers under the same circumstances.[1]

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[1] The arresting officer's testimony regarding this question was as follows:

Question by Defense Counsel:
Answer by Arresting Officer:

Q. Now, Officer, with respect to the custom and practice in the State of Mississippi by highyay patrolmen, I wish to inquire of you whether or not it is customary for you immediately to transport those persons who are driving through your state from out-of-state to jail, if you find that they have violated any traffic laws of the State of Mississippi?

A. Yes, sir, it is.

Q. Now, I'm asking you now whether or not this is done without exception?

A. No, sir, it is not.

Q. So, there are exceptions made as to when you will take a person to jail for a speeding violation and when you will give him the privilege of returning to their place of destination and sending money back, is that correct?

A. Yes.

(*continued on next page*)

Based upon the police officer's testimony the question of whether to arrest or not arrest is controlled solely by the visceral reaction of the officer to the subject with specific

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(*continued from preceding page*)

Q. And, this discretion is something that you exercise solely as a police officer, is that correct?

A. Yes.

Q. Now, Officer, why is it that you chose not to exercise your discretion in favor of letting these Defendants go on about their way to Michigan as opposed to telling them that they would have to be taken to jail?

A. By being the officer that I am, the tickets that I write, the amount of tickets that are returned to me that have never been taken care of; the warrants issued for people to return to take care of tickets, are very plentiful; very many do not ever return to take care of tickets.

Q. Well, sir, why did you assume that they would not return?

A. They were very far from out-of-state and probably would never return to the state.

Q. Well, what would make you decide they would never return, when you made decisions that would be contrary to that for other persons?

A. By his reactions.

Q. But, you had already told him, sir, that he would have to go to jail to post a bond; you told him that you were going to give him a ticket; that he was guilty of having violated the basic speed laws of the State of Mississippi, and that he would have to go to jail in order to post bond; you told him that, did you not?

A. No, sir, I did not.

Q. I thought I understood you to say that during the course of your direct testimony.

A. You said that I told Arthur Baldwin he was guilty; I did not; it was up to the court if he was guilty; all I advised him, we would go to the jail; meet with the judge to take care of the citation.

A. Well, I'm asking you, sir, now, why did you elect to do that with respect to Arthur Baldwin when you have already testified that on occasion, you don't do this.

Prosecutor Graves: I think he has answered that, your Honor; he's belaboring the—

The Court: —I think he's answered it, but I'll let him ask it one more time.

Q. (By Defense counsel): Why sir, did you decide not to give Arthur Baldwin the privilege of leaving the state after having been cited by you for violation of the Mississippi speed laws?

A. By my experience, I did not believe, he would return.

(*continued on next page*)

emphasis being placed upon the interest of the State in collecting the fine. Indeed no consideration is even given to the seriousness of the offense in making such judgments.

(*continued from preceding page*)

Q. Now, you based that belief upon your very limited contact that you had with Arthur Baldwin during the course of your discussion with him, did you not?

A. Describe what you mean by limited contact.

Q. When you stopped Arthur Baldwin, you told him that you were going to charge him with a violation of the speed laws; you asked that he came to your car and be seated for purposes of writing him a ticket; and you advised him that when the ticket was issued, that he would have to accompany you to a magistrate; that was the extent of your initial contact with him, was it not?

A. What specifically do you want answered out of that question?

Q. Well, sir, I'm asking you to answer the entire question, if you can understand it; if you don't understand it, tell me that you don't understand it, and I'll ask it again.

A. I don't understand the question.

Q. I asked you, sir, whether or not you made the decision as to whether or not you would let Arthur Baldwin leave based upon your limited contact that you had yith him, and then you asked me what do I mean by limited contact, and I told you, just the transaction that you recited on your direct testimony.

A. Witness: I'll have to explain it.

The Court: All right, sir, you may explain it.

A. (By witness): I deal with the general public. As the general public—my experience with the general public is not limited; I deal with a great number of people from out-of-state and in state. My experience with most of the out-of-state people deals with their behavior. Usually when their behavior is very concerned about their safety, I will allow them to go on.

Q. So, you are saying that you didn't allow this family and this gentlemen to go on, because apparently, he didn't have any concern for his safety, is that what you're saying?

A. True.

Q. Very well, so, Officer, you took Mr. Baldwin into your police car, and you advised him also that it would be necessary for him to accompany you to a magistrate. that's right, isn't it?

A. I didn't advise him I was going to write a citation; I wrote the citation, advised him we were going to have to return to the judge's chambers, to have the citation taken care of.

(*continued on next page*)

In light of the testimony of the arresting officer regarding the arrest of the Petitioners, one must come to either of two conclusions:

1. That Baldwin's arrest was predicated upon his color and the apparent presumption by the arresting officer that black people do not respond favorably to the privilege of being ticketed as opposed to arrested or,

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(continued from preceding page)

Q. Now, at that time was he under arrest officially?

A. I placed him under arrest when I sat him down in the car—when he shut the door, I placed him under arrest.

Q. Now, you placed him under arrest because you knew that the arrest would be necessary in order for him to accompany you in order (sic) to the magistrate, isn't that correct?

A. That's true.

Q. So, immediately when that man sat down in your police car, you placed him under arrest and you had decided that you would not give him the privilege of returning to his home. Is that correct?

Prosecutor Graves: At this time, I would like for the record to reflect the loud and forceful voice of defense counsel—

Defense Counsel: —I'm very sorry, Mr. Graves, I meant no offense to you nor to the Court nor to the witness.

Q. (By Defense Counsel): Is that correct, sir?

A. Could you repeat the question?

Q. You indicated that as soon as Arthur Baldwin seated himself in your patrol car at your request, that you announced to him that he was under arrest, is that correct?

A. Yes, sir, I did.

Q. So, by making that announcement, you had concluded that you would not afford him the privilege of being cited and given the privilege to go on, is that correct?

A. Explain your question as to—(stops).

Q. Well, you knew at that time, sir, that this would not be the person, or one of the persons that you would say, "Sir, I'm going to issue you a ticket, you may continue on your way, and you may send the ticket back at the time prescribed on the ticket." You knew at that time you would not do that for Arthur Baldwin, did you not?

Prosecutor Graves: We will stipulate to that, your Honor.

2. That the action of the arresting officer was completely arbitrary and standardless, not having been grounded in any definable policy or reason. Both of these alternatives fail the constitutional tests.

The Supreme Court, in its opinion, contended that the jury found no impermissible discrimination as to Petitioners by the arresting officer. Such a constitutional question was not and should not have been submitted to the jury. Petitioners' Motion in this regard was summarily denied by the Trial Court without comment.

The following circumstances were considered by the Supreme Court of Mississippi, not to have caused any prejudice to the Petitioners.

1. Petitioners and their counsel were constrained by Order of the Trial Court without Notice to try the entire case in one day, commencing at 9:00 A.M. and concluding at 1:00 A.M. the following morning.[2]
2. Defense counsel having been intentionally locked out of the Court House by the Bailiff during the

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[2] The Supreme Court in its opinion excused any hardship that the continuous trial worked upon Petitioners, claiming that the trial date was set as a special accommodation to defense counsel. It should be noted however that Petitioners' Notice of trial advised that their trial would commence on February 26, 1973. Petitioners and Counsel were present and ready to proceed at that time, only to be told that they would have to be indicted first and further that the earliest that their trial could be scheduled was March 1, 1973. Naturally defense counsel requested trial on the earliest available date in light of the fact that the Court misled Petitioners into believing that the case would be reached for trial on the 26th day of February, 1973. There was no special setting of the cause for trial for the "Personal convenience" of Defense Counsel as was claimed by the Prosecution. In any case, the delay in getting the cause to trial on the date set forth in the Notice of Trial was a state caused delay which operated directly to the prejudice of the Petitioners.

supper recess when neither the Judge, Prosecutors nor Jury were locked out of the building.

3. The Trial Court stating just prior to the supper recess that the trial would have to continue until finished regardless as to how long it took and further that defense counsel's instructions to the jury would have to be submitted to the Court immediately after the supper recess.[3]

4. Defense Counsel having been left outside the Courthouse to prepare the instructions to the jury with little or no lighting except from street lights and in the midst of a crowd of hostile people who had gathered outside the Courthhouse who were making deragatory and threatening remarks to defense counsel as he attempted to prepare instructions to the jury on the Court house steps.

5. Defense Counsel was afforded only a period of 15 minutes to prepare a closing argument covering a total of 15 hours of trial testimony.

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[3] By Court Rule instructions are to be submitted to the Court at least 24 hours prior to the commencement of trial. The rule however was waived as an accommodation to Defense Counsel on the morning of the trial. In light thereof, Defense Counsel had planned to prepare his instructions during the evening after the first day of trial which he anticipated would last at least four days. The Court's announcement just prior to the supper recess that the trial would continue on into the night and that the Defense Counsel's instructions would have to be submitted immediately upon return from the supper recess, took counsel completely by surprise.

Notwithstanding the circumstances under which defense counsel had to prepare his instructions, it is felt that such a rule is oppressive on its face in that it makes no allowance for the fact that testimony at trial often determines what kind of instructions should be offered at the close of the trial. That is to say, as a practical matter, it is impossible to predict what questions of fact will emerge during the course of trial that would necessitate the submission of instructions thereon.

6. Two prosecutors participated in the trial of Petitioners, with one taking notes and the other objecting and vice-versa—One opening the summation and the other giving the closing rebuttal argument.[4]

Petitioners contend that the above-described circumstances considered, either separately or together, were prejudicial to the Petitioners as a matter of law.

Respectfully submitted,

ELBERT L. HATCHETT OF
HATCHETT, SPINKS, KEEL &
HATCHETT
Attorney for Petitioners
485 Orchard Lake Avenue
Pontiac, Michigan 48053
AC 313-334-1587

[4] This would not *ipso facto* be prejudiced and indeed is a prerogative of the prosecutor's office. However, when consideration is given to the other circumstances the unfairness of such an arrangement becomes apparent.

SUPREME COURT OF MISSISSIPPI

Arthur Baldwin, et al
v
State of Mississippi
No. 47,853

Smith, Justice:

OPINION

This case involves an alleged concerted attack by appellants upon an officer of the Mississippi Highway Safety Patrol which followed upon the arrest of appellant Baldwin for driving his automobile 83 miles per hour on U. S. Highway 61, where the legal limit is 65. It appears to be conceded that Baldwin was, in fact, driving his automobile at that speed in violation of the legal limit at the time of his arrest.

Baldwin's party, consisting of relatives and friends, all residents of the State of Michigan, were traveling in two automobiles, with Baldwin's car some distance ahead of the second car. Shortly after the patrolman had arrested Baldwin, the second automobile containing appellant's cousins, Samuel Carter, William Carter and James Carter, and their respective families, arrived upon the scene. From this point on, the evidence for the prosecution and that for defense is in irreconcilable conflict. The version of Baldwin was to the effect that the officer adopted a hostile, insulting and "racist" attitude toward him, mistreated him, and then arbitrary and unreasonably sought to take him to jail instead of giving him a "ticket" for the violation. The testimony of the patrol officer, and other witnesses who testified for the prosecution, directly contradicts this account of what happened in all material particulars. By its verdict, the jury rejected the account of the affair given

by appellants and their witnesses and accepted the version supported by the testimony of the witnesses for the prosecution.

According to the officer, following Baldwin's arrest, Baldwin's attitude was hostile and defiant. Baldwin was informed by the officer that it would be necessary to take him before a magistrate at the jail in Tunica, the county seat, a few miles further on. There, he was told, the "ticket" would be dealt with by that official. Whereupon, Baldwin told the officer that, "you're not taking me to any goddam jail." The officer then decided, not unreasonably, that it was expedient that handcuffs be placed upon Baldwin for the journey to the magistrate, as the officer was traveling alone, upon a stretch of highway through the open country. As the officer reached for his handcuffs, he was grabbed from behind by two of the Carters. While they held the officer, Baldwin beat him with his fists, as well as with the patrolman's pistol which he had taken from him, and kicked him. Although the testimony at this point is in direct conflict as to what was said, as well as to what occurred throughout this episode and as to what followed, there can be no doubt that, in the course of the struggle between the officer and his several assailants, the officer sustained severe cuts and abrasions about his face and head, which required some 15 to 17 stitches. The blows struck with the pistol bent the trigger guard so that it was impossible for Baldwin to pull the trigger when he attempted to shoot the officer.

After the struggle had continued for a time, the officer in some manner managed to extricate himself from his attackers and run to the patrol car which he entered and locked the door. Aid was summoned by radio and eventually arrived. Meanwhile the arresting officer had

obtained his shotgun from the patrol car and was attempting to hold appellants. Mistreatment at this juncture is also alleged by appellants and denied by witnesses for the prosecution. This claim of abuse, including a claim by Baldwin that his nose was broken, was denied, and seems to have been refuted also by the introduction of a full face photograph, taken when the appellants arrived at the jail, which reflects that there was no visible sign of injury.

Appellants were represented at their trial by able counsel of their choice, a member of the Michigan Bar. On this appeal he raises two main questions.

These questions are stated in appellants' brief as follows:

> Whether or not a state statute which allows broad arrest discretion to police officers when such discretion is applied in a discriminatory manner against out-of-state residents, and when race is specifically shown to be a factor in the exercise of that discretion, violates the equal protection of the law and/or the privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States?
>
> Whether or not the defendants' constitutional rights to due process of law and right to counsel were violated by the court:
>
> 1. Ordering their trial continued without prior notice and over the objections of their counsel beyond the normal evening adjournment time and into the early morning hours of the next day.
> 2. By the fact that their counsel was constrained to hurriedly prepare instructions to the jury on their behalf on the steps of the courthouse under street lights at night.

3. When their counsel is afforded a period of only fifteen minutes within which to prepare a closing argument covering a total of fifteen hours of trial testimony and when there were two prosecutors participating in the trial of the cause who shared both the preparation and the giving of the State's closing argument—one opening and one closing?

The argument upon the first question is directed toward the proposition that, while residents of this state, in cases of traffic law violations, are given tickets or citations, which only require them to appear before a magistrate, and are not taken into custody or taken before a magistrate by an officer, but are permitted to go on their way to appear at a time and place specified in the ticket or citation, non-residents are not cited to appear but are taken before a magistrate by the arresting officer prior to being released, and that this amounts to unconstitutional discrimination against non-residents.

Prior to the trial, the question now argued was sought to be raised by motion. In the motion, it was asserted that appellants' arrest had resulted from "the exercise of racially discriminatory discretion exercised by the arresting officer in placing Baldwin under arrest for traffic violation rather than issuing a citation to appear." No proof of any kind was offered in support of this preliminary motion and it was overruled. The point was not raised again in the course of the ensuing trial at any time. In *Brown* v *State*, 252 So. 2d 885, 887 (Miss. 1971) it was held:

> It is a well-settled rule in this state that a motion is at issue without further pleading and that the allegations thereof do not amount to any proof of the facts stated therein. It is the duty of the movant to support his motion by proof and in the absence of

> proof in support of the motion, the presumption in favor of the correctness of the action of the trial court will prevail. Harvey v State, 218 So. 2d 9 (Miss. 1969).

This Court said in *McMillan* v *Tate,* 260 So. 2d 832, 833 (Miss. 1972):

> In the absence of any proof in support of the motion we cannot put the trial court in error for overruling the same.

See also Loden v Joslin, 229 So. 2d 825 (Miss. 1969), citing Harvey v State, 218 So. 2d 9 (Miss. 1969).

The jury, in returning its verdict, accepted the version of facts testified to by the witnesses for the prosecution and rejected that supported by witnesses for the defense. According to the prevailing evidence, the officer told Baldwin that he was taking him immediately before "a magistrate at the jail" in Tunica where the charge would be dealt with. In view of Baldwin's intransigence, hostility and his defiiant statement to the officer that he wasn't going "no where with you," the actions of the officer under the circumstances were neither unreasonable nor unlawful.

There was no motion for a new trial following the verdict.

It is a necessity, inherent in the situation itself, that nonresidents of the state arrested on the highway for traffic violation be taken immediately before a magistrate, instead of merely being cited to appear, since there is no practical method of enforcing compliance with the citation. This same practice, as a matter of common knowledge, is followed by city police in the arrest of traffic violators who do not reside in their city. Regulation of traffic is a matter

of vital consequence in this country and a mere gesture, such as the giving of a ticket to a nonresident violator, could never be effective. This kind of discretion vested in an officer as to whether to arrest a traffic violator or merely to issue him a summons is not in and of itself a violation of equal protection guarantees. In fact, this same sort of discretion is recognized nationally as affording officers alternatives in the face of such violations and some states, including Wisconsin, have statutory authority which legislatively recognizes such discretion. So long as such discretion is not exercised on the basis of an impermissible standard such as race, discretion as to whether to arrest or merely to issue a citation is not constitutionally offensive. As a matter of fact:

> The notice to appear is ordinarily used only for persons who reside within the jurisdiction served by the particular officer. A county traffic officer is likely to arrest a violator who is not a resident of the county, while a state conservation warden will probably use a notice to appear for all state residents. Even in the case of residents, an arrest will be made if it is apparent that the person is about to abscond. (Wayne R. LaFave, *Arrest,* The Decision to Take a Suspect into Custody, page 180, (1965).

The vesting of such discretion in members of the Mississippi Highway Safety Patrol is not discriminatory, in the absence of resort to impermissible standards such as race, since such discretion is an aspect of the police power reasonably exercised.

By arrest in this context is not meant incarceration, but merely means that the individual is taken to a magistrate, who immediately holds trial and if guilt is determined, sets the penalty. The United States Supreme Court has

not determined that every classification which distinguishes between groups of people is unconstitutional and the present classification, in view of its reasonableness, cannot be said to violate equal protection guarantees.

The following statement was made in the case of *United States* v *Sacco,* 428, F. 2d 264 (9th Cir. 1970):

> The conscious exercise of selectivity in enforcement is not in itself a constitutional violation where it is not further alleged that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." (428 F. 2d at 271).

Although Baldwin sought to place his arrest upon "racist" grounds, this was directly contradicted and was a fact issue for the jury, as the trier of facts.

The second proposition advanced by appellants on this appeal is to the effect that their constitutional right to due process was violated by the trial court in continuing the trial into the night, so that appellants' counsel had to prepare his jury instructions hurriedly and had only fifteen minutes in which to prepare his closing argument. An objection raising this point was not interposed by defense counsel in the course of the trial, and, consequently, no opportunity was afforded the trial court to rule upon it. It is true that from time to time defense counsel stated that he "wished the record to show" this or that, but the trial court was not called upon to rule.

The offense occurred in Tunica County, the county seat of which is Tunica, a rather small community. The court term, at which this case was tried, is fixed by statute at twelve days. During this time this case, as well as other civil and criminal cases on the docket of the court, had

to be dealt with. When the court recessed for "supper" the courthouse was closed and locked. This was by no means done to deny counsel access thereto during the recess for the evening meal and was not, in any sense, directed against him at all.

Court dockets are crowded throughout the country. It is not unusual in this state to utilize the evening hours to complete a trial in progress. In any event, in this case, appellants are not shown to have been prejudiced thereby.

In order to appear and represent his clients, defense counsel, a member of the Michigan Bar, was free to act alone. He was not required to associate local counsel and he elected not to do so. When an attorney enters a foreign jurisdiction for the purpose of trying a case in the courts of that jurisdiction, association of local counsel often can be helpful in advising as to established court rules, practice and procedure, and state statutes which might have an application or be encountered in the trial of the case. Whether to associate local counsel is, of course, a matter of individual judgment. In the case here, it does not appear that any preliminary investigation or research was done with respect to these local statutes or court rules. Counsel chose to stay in the City of Memphis, Tennessee, until the trial, and commuted from that city to Tunica, Mississippi, where the trial took place. When it appeared to the District Attorney that proposed requests for specific jury instructions, as required by Mississippi statute, were not going to be filed by defense counsel twenty-four hours in advance, as required by the published Circuit Court Rules, that official sought, although without success, to get in touch with defense counsel in Michigan so that he might apprise him of statutory and court rule requirements with respect to jury instructions.

Mississippi Code Annotated section 11-7-155 (1972) provides that the court may not grant any instruction to a jury *sua sponte,* but may only give the jury such instructions as shall have been prepared in writing and requested by respective counsel. Rule 14 of the published Rules of the Mississippi Circuit Courts, provides that desired instructions be prepared and filed at least twenty-four hours in advance, in order that objections thereto may be made by the opposite party and considered by the court.

In this event, however, the circuit judge waived the twenty-four hour requirement as to the instructions eventually requested by defense counsel. It was inconvenient, certainly, not to have available an office and secretary, but it is difficult to see how the state was responsible for it. The locking of the courthouse while the court was absent during the interval of the recess for the evening meal was not done to keep counsel out. It does not appear that the court or the District Attorney knew that counsel had made no arrangement for a place where he might prepare to do whatever he considered necessary or expedient for the defense of his clients, including the preparation of instructions. Certainly no request was made for such accommodations or denied by any official of the State of Mississippi. Had there been a request, an arrangement could have been made, and doubtless would have been made, for counsel's accommodation in this matter.

Before the trial commenced, defense counsel was aware that the state had already submitted its instructions to the court. The twenty-four hour Mississippi rule was waived in his favor. The decision to wait until the last moment to draft instructions was his.

Testimony in the record indicates that defense counsel desired to have the trial set for the date at which it actually

was set "for his personal convenience" and was "very anxious" for such arrangements to be made by the trial court. In spite of a crowded docket and in spite of cases which had been set for the following day, the trial court accommodated him.

Appellants were properly indicted and tried in the Circuit Court of Tunica County upon a charge of assault and battery in violation of Mississippi Code Annotated section 97-3-7 (1972), a felony.

The record reflects that they were vigorously and ably defendant by their counsel in the trial court as well as on appeal in this Court. The evidence was sufficient to support the verdict of guilty returned by the jury. No prejudicial error having been shown to have occurred in the course of the trial, the conviction and sentences appealed from must be affirmed.

Affirmed.

Gillespie, C. J., and Patterson, Inzer and Sugg, JJ., Concur.

EXCERPT OF TRIAL TESTIMONY OF COMPLAINANT ROY WILEY WOOTEN

• • • • •

(39) Q. What happened then?

A. We got him back on the trunk of the patrol car; we did handcuff him, and laid him back in the road.

Q. Now, you testified before that when Arthur Baldwin attempted twice to get up, you hit him with your foot to keep him down, is that correct?

A. Yes, sir.

Q. And, you testified that when he attempted to go for Officer Aubuchon, you hit him with the gun to keep him from going for Officer Aubuchon?

A. Yes, sir.

Q. Did you hit him at any other time?

A. No, sir.

Q. Did you hit any of the other defendants?

A. No, sir, I did not.

Q. Now, I believe you stated that Officer Tommy Copas, (sic) who is a deputy sheriff in DeSoto County, was present at this time, is that right?

A. Yes, sir.

* * * * *

(49) Q. Very Well, So Officer, you took Mr. Baldwin into your police car, and you instructed him that he was going to be cited, and you advised him also that it would be necessary for him to accompany you to a magistrate, that's right, isn't it?

A. I didn't advise him I was going to write the citation; I wrote the citation, advised him we were going to have to return to the judge's chambers, to have the citation taken care of.

Q. Now, at that time was he under arrest officially?

A. I placed him under arrest when I sat him down in the car—when he shut the door, I placed him under arrest.

Q. Now, you placed him under arrest because you knew that the arrest would be necessary in order for him to accompany you in order (sic) to the magistrate, isn't that correct?

A. That's true.

Q. So, immediately when that man sat down in your police car, you placed him under arrest and you had decided that you would not give him the privilege of returning to his home. Is that correct?

Mr. Graves: At this time, I would like for the record to reflect the loud and forceful voice of defense counsel—

Mr. Hatchett: —I'm very sorry, Mr. Graves, I meant no offense to you nor to the Court nor to the witness.

Q. (By Mr. Hatchett): It that correct, sir?

A. Could you repeat the question?

Q. You indicated that as soon as Arthur Baldwin seated himself in your patrol car at your request, that you announced to him that he was under arrest, is that correct?

A. Yes, sir, I did.

• • • • •

(55) A. Mr. Graves: I object to that, Your Honor; I don't think that's proper cross examination.

The Court: I'll let him ask it.

A. (By witness): Repeat the question.

Q. (By Mr. Hatchett): You testified that perhaps it didn't annoy you; I'm asking you why you instructed him to address you in another manner if it didn't annoy you?

A. I'll have to explain that.

The Court: You may explain it.

A. (By witness): When I am dealing with a law enforcement matter, I expect to deal with straight across the board, not being rude to; I do not expect for someone to be rude to me and just expect to get away with it. I advised him he could deal in—(pause)—he could deal in a straight manner, and explain—stop all the foolishness.

Q. Well, sir, you've characterized this conversation foolish because he said, "Yeah" and "Naw", instead of "Yes, sir", and "No, sir", is that what caused you to characterized him as being foolish?

A. No, sir, it's not.

Q. And, you're saying you were undisturbed completely by the fact that this man did not address you as "Sir", but instead chose to say, "Yeah" and "Naw" to your inquiries, is that right?

A. I was not annoyed; it did disturb me.

Q. Really. Now, Officer, I'm wondering whether or not at any time during the course of your conversation in dealing with Arthur Baldwin in your patrol car, whether you lost your temper?

A. I haven't lost my temper as—

* * * * *

(65) A. I've accounted for that.

Q. Well, you said that the people were going to kill you; that that was your impression; that was your conclusion.

A. After being beaten and tried to be shot at, I believe somebody was after my life.

Q. You thought that they were going to kill you, did you not?

A. They had tried it.

Q. Are you saying that they were unsuccessful in their effort to kill you solely because the gun would not discharge, is that what you are saying?

A. I'm saying that the gun—well, explain the question.

Q. Are you saying, sir, that these people were not able to kill you solely because the gun would not discharge.

A. I don't know why they did not kill me.

Q. Well, sir, do you not feel that you could have been killed by this gun had the gun been used as a weapon, a striking instrument?

A. I received several blows from that gun; I recovered from those blows, I was not knocked unconscious—

Q. —but you recovered, sir, because they let you recover, did they not?

Mr. Graves: That's a conclusion, Your Honor.

The Court: He's on cross examination; overrule.

A. (By witness): For some reason, whether I escaped from them, or they released from me, I broke loose and ran; I did not stop to ask whether they released me; I broke and ran.

Q. So, sir, you are saying now, that you broke and ran, not that they let you go of their own free will and volition, is that what you are saying?

A. You will have to explain that.

• • • • •

EXCERPT OF TRIAL TESTIMONY OF PROSECUTION WITNESS GERALDINE WHEELER

(93) Q. Do you know whether or not he had been in the police car before you arrived?

A. No, I don't.

Q. Did he arrive at the scene prior to your arriving there?

A. He was there before I was, yes. Well, I guess, I mean, I—

Q. —Now, it is your testimony that when you arrived at the scene, there were four black subjects lying on the ground?

A. Well, they were there. Yes. I say they were lying on the ground; they may have been seated; I'm not going to say, that they were down; he had them under control, except that they would jump at him. As he would—he—they just jumped at him, and he was bleeding, and they just kept jumping at him.

Q. What do you mean they were jumping at him?

A. Well, say I was down here, and you had this many people here, and you had a gun on me, and that one there jumped at you, and he'd just move it around, and this one would jump at you.

Q. Well, did you see him kick any of them?

A. No, I did not.

Q. Are you saying that the people who were on the ground were resisting this officer?

A. Yes.

Q. And, the officer would do nothing but train his gun upon them, and at no time did he offer any blows to their body?

A. No.

Q. Is that what you are saying?

A. That's what I'm saying.

Q. Did you see any ladies there, ma'am?

A. Well, I tell you, they all looked like men to me.

(94) Q. Yes, ma'am, but I'm asking you—

A. —I mean, they really did.

Q. I'm asking you—

A. —I didn't see any that I thought was a lady; I thought they were all men.

Q. Well, did you subsequently learn that there were persons there on the ground who were, in fact, women?

A. No, not really; my children said—I mean, I just don't know.

Q. Did your children tell you that there was a lady—

A. —they didn't know; my kids were real excited, like I said; they are four years old and five.

Q. Well, were there any people down the road, ma'am, any black persons at the time that you arrived at the scene?

A. There was some cars there that come up there and would leave.

Q. Yes, ma'am, but were there any people that you understood had been involved in the transaction there, who were in flight, you know, leaving the scene?

A. I didn't notice.

Q. So, when you got there, the officer had things well under control according to your description?

A. Yes.

Q. And, the only thing that indicated to you that it was not under control was that some of the persons on the ground would occasionally jump at the officer—

A. —that's right—

Q. —as you have described it, and he would say words to them—

A. —no, he did not; if he did I didn't hear it—

Q. —what did he do—

A. —he just calmly, move over here, just calmly, and just—

EXCERPTS OF TESTIMONY OF PROSECUTION WITNESS FRED BURCHFIELD

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(102) Q. Did you see any women—any black women on the street when you arrived?

A. Well, one I know.

Q. And, what was her position?

A. Well, she was standing there pretty close to the patrol car.

Q. Was she under arrest as you could determine?

A. Not that I could determine because she was walking up and down the side of the highway.

Q. Was there a child with her?

A. Yes.

Q. What about the defendants here that you see, what were their positions?

A. Well, at the time when I got there, they were laying face down on the highway.

Q. Do you know why they were laying face down?

A. Yes, because Wooten had placed them under arrest and was standing guard over them.

Q. He was guarding them with what?

A. A shotgun.

Q. Did you hear him issue any instructions to those persons as they lay on the ground?

A. No.

Q. Did you hear the persons make any remarks to the officer?

A. No.

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EXCERPTS OF TESTIMONY OF PROSECUTION WITNESS TOMMY COPOUS

(106) *Cross Examination*

By Mr. Hatchett:

Q. Officer Copous, is there anything that you can recall with respect to conversations that were had between Officer Wooten and the defendants?

A. No, sir.

Q. Were any words exchanged at all in your presence? Between the defendants and Officer Wooten?

A. I didn't hear any.

Q. Did you hear Officer Wooten instruct them to lie still on the ground?

A. I did not.

Q. Did you see any of the defendants attempt to flee?

A. No, sir.

Q. Did you see any of the defendants attack Officer Wooten?

A. No.

Q. How many persons were on the ground when you arrived there?

A. There was two or three.

Q. Was there another one brought to rest on the ground later?

A. (No audible answer).

Q. And, that person was taken from the field nearby?

The Court Reporter: Did you answer that question, "Was another person—"

Witness: —Yes.

The Court Reporter: "And, that person was taken from the field".

Witness: No.

Q. (By Mr. Hatchett): Are you saying, "No", in answer?

A. That's right.

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EXCERPTS OF TESTIMONY OF PROSECUTION WITNESS DR. T. K. CHANDLER

(114) Q. And, at no time did you examine his ribs or his arm, or any other part of his body?

A. Oh, yes, I went over him all over when I first saw him at the hospital.

Q. Did you make notes with respect to your findings?

A. No.

Q. Was there anything that would be determined medically to be remarkable about the examination other than the fact that you applied sutures to his head?

A. No.

Q. Now, doctor, I know you are not a gunsmith, but I'm going to ask you to examine this weapon, if you will please.

A. (Witness examine weapon).

Q. Now, as a doctor, I will ask you, sir, whether or not a weapon of this sort is capable of inflicting a wound on the scalp or the head that would require stitches?

A. Sure, certainly, yes.

Q. Would it be your opinion, sir, that this part of the gun could inflict a cut sufficient to require suturing? If it were dragged across the head or the body of a person?

A. I don't see how I can point out any special part of the gun; any of these places could done it.

Q. Any place could do it?

A. That's right.

Q. Doctor, I ask you now whether or not if the gun was used in this manner as a weapon, and if it was brought down upon the head of a person, whether you can speculate as to exactly the extent of the damage of the recipient of a blow from this instrument in that manner.

A. You can't speculate; I know it would cause some damage, but (115) you can't tell how much, because it would be impossible, people are different.

Q. Yes, sir, but now, in the event, Doctor, that the blow was delivered with this kind of force upon the head of anyone, or force sufficient, sir, to bend this steel, would you think that a person could survive a blow of that type?

A. Sure.

Q. Would it require, sir the application of more sutures than five or six?

A. Not necessarily.

Q. Well, how could you explain it, sir?

A. I can't explain it; you can't—any kind of a blow, you can hit the same blow with the same force at the same place one time after another, and you will have a larger cut one time than you would the other; they are not the same all the time.

Q. But, sir, examining the weapon itself, and looking at it particularly in the light of the trigger guard here, and trying to make some determination as to the kind of velocity that would be necessary in order to bend this, can you then speculate as to what kind of damage it would inflict to the skull; would it not result in a fractured skull?

A. Not necessarily.

Q. But, would it not require an injury that would be more extensive than one that would require two or three or four sutures?

A. Not necessarily; but every stitch on his head, I took, other than his eyebrow, I took more than four sutures.

Q. Well, what about five, sir?

A. I took more than that?

Q. Well, how many sutures did it take in his head? The top?

(116) A. I took six in his head; six in his forehead; three in his eyebrow.

Q. That's a total of fifteen?

A. That's right.

Q. And, you're saying as a doctor that a blow could be offered by this gun to the extent that it would bend the trigger guard and not inflict any more damage to the skull than that?

A. You can bend that gun without getting a fractured skull, yes, I'll say that.

Q. Without getting a fractured skull?

A. That's right.

Q. Hmmm.

A. Now, I'm also saying you could get a fractured skull also, but that doesn't necessarily follow that you're going to get it.

Q. Yes, sir.

Mr. Hatchett: That's all.

Mr. Graves: Nothing further.

EXCERPTS OF TESTIMONY OF PETITIONER, ARTHUR BALDWIN

(132) Q. Well, how did you know that the light was intended for you?

Q. Well, I assumed that it was for me, because it wasn't any other car no where around.

Q. Now, were there other persons that had accompanied you on your trip to Vicksburg who were driving behind you in another car?

A. Yes.

Q. How far behind you were they?

A. Well, he was approximately four car lengths behind.

Q. So, you, in any case, pulled your car over to the side of the road, because the officer had his flasher on?

A. Right.

Q. What happened then?

A. Well, he made a "U" turn in the road, and kept his flasher on, and I was looking through the rear view mirror, and he beckoned for me to come back; so I got out of my vehicle and went back to his vehicle.

Q. Whose vehicle was that?

A. Officer Wiley Wooten.

Q. What happened to you when you got to Officer Wooten?

A. He pulled his radar in front of me, and say, "I have on the radar that you were speeding". I said, "Okay". He said, "What's wrong with you nigger, you don't know how to say, 'Yes, sir'-" I reply, "I don't see why I should have to say 'Yes, sir'."

Q. Well, then what did he say?

A. Then he said, "Well, I'm going to teach you how to say 'Yes, sir'; get out of the car, nigger".

* * * * *

(136) Q. Well, what did he say, sir, that would lead you to believe that he was going to kill you, or do you any harm at all?

A. He said he was going to beat me up; he said, "I'm going to teach you, nigger, how to say 'Yes, sir'."

Q. And, it was, therefore, your conclusion that he was going to inflict blows upon your head or your body at that time?

A. Yes, sir—

Mr. Graves: —object to him leading the witness.

The Court: Sustain the objection. Do not lead the witnes, Mr. Hatchett.

Q. (By Mr. Hatchett): How long did Officer Wooten have possession of his revolver?

A. It wasn't too long.

Q. Why?

A. Because I had it.

Q. How did you get it?

A. Twisted it out of his hand.

Q. Well, describe to the Court and the jury the manner in which you succeeded in taking his service revolver?

A. Well, he had the revolver up—

Q. —excuse me, use this please.

A. Well, he had the revolver up like that as if he was going to come down with it, and I grabbed it and twisted it out of his hand. And, when I twisted it out of his hand, I threw it across the field.

Q. Well, now, did the gun strike the officer at all?

A. Yes, it struck him.

Q. Well, did you strike him with the gun?

A. It was accidentally.

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(143) Q. Who beat you all the way to the jail?

A. Well, this guy with the blue jeans on, I don't know whether he was the jailer, or what, he wasn't dressed as an officer. He was dressed in plainclothes.

Q. Did you have any conversation with him during the course of your traveling—

A. —yes, he said, "I'm going to kill you, nigger". And, "You're going to Parchman", and put the gun up under my neck, you know, and some—beat me over the head with the blackjack. Beat me all the way to the jail with the blackjack.

Q. Did you sustain any injuries that required any medical treatment?

A. Yes, I did.

Q. What kind of injuries did you receive, Arthur Baldwin?

A. I sustained a broken nose.

Q. How did you get it broken?

A. By the beating with the blackjack.

Q. Do you know—

A. —plus a number of cuts in my head.

Q. Now, have you required medical attention for that broken nose?

A. Yes.

Q. What kind of medical attention was given to you?

A. I had surgery.

Q. Now, when and where was this surgery given?

A. At St. Joseph Hospital in Pontiac, Michigan.

EXCERPT OF DISCUSSION BY COUNSEL WITH COURT REGARDING INSTRUCTIONS

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(240) Let the record show that it is now ten o'clock at night, and that the instructions that we have submitted to the Court were prepared on the courthouse steps during the recess; we could not get into the courthouse during the 7:30 recess, and we prepared them as best we could under the circumstances.

The Court: How long have you represented the defendants in this case?

Mr. Hatchett: Since Monday, Your Honor; since we arrived here Monday.

The Court: When were you employed?

Mr. Hatchett: Oh, two days before we came.

The Court: Did you anticipate asking the Court for permission to represent these defendants in Mississippi, without local counsel?

Mr. Hatchett: Yes, sir.

The Court: Then, you would know, of course, that you have to follow the rules of the Court wherever you may be, where it is California or New York or Mississippi. Therefore, that's a risk you assume.

Mr. Hatchett: Yes, Your Honor, I'm not charging, and I don't want the Court to take the position that we are charging the Court with any irresponsibility; it's a matter of (241) circumstances.

The Court: You must realize further that I have waived the rule which I don't normally waive; I actually rule out instructions if they are not properly filed twenty-four hours before trial; you were not aware of the rule, therefore, I waived the rule, so I granted you that consideration that I normally do not grant. Furthermore, you were very anxious to get this case set for today, Thursday, for your personal convenience, whatever that might be. If you had asked for a setting in this case next week, or any other day during this particular term that didn't conflict with some other case.

Mr. Graves: Your Honor, I would like for the record to show that these defendants were represented on a previous day, on October 5th by a Mr. Robert Kelly at a preliminary hearing which was transcribed by a court reporter. Mr. Robert J. Kelly of Oxford, Mississippi, who is a member of the Mississippi Bar in good standing, and that Mr. Kelly apparently was paid counsel for these individuals. I would also like for the record to show that Mr. Elbert Hatchett is retained counsel, not appointed counsel, and that he requested that we set this case for Thursday, today, the date it was set. I would like for the record to show that on Wednesday, yesterday, Mr. Tommy Tucker, the county attorney, and I became concerned about the fact that Mr. Hatchett had not filed instructions, and we attempted to contact him; we called his law office in Pontiac,

Michigan, to find out what number he could be reached at in Memphis, Tennessee, and we tried several times to reach him at the number in Memphis, Tennessee, and were unable to reach him, because we intended to inform him of when instructions should be filed in Mississippi.

(242) Mr. Hatchett: Let the record show that everythink the prosecution has said about his attempts to reach me is, perhaps, true, but I do not feel that that at all alters the fact that when I came to this court today that I expected that this matter would proceed for today and tomorrow, and that at no time did I feel that I would be constrained to continue this trial until the late evening hours of this day. I do not wish to try at all to indicate that the Judge has been unfair in this regard to us; I can appreciate the difficulties of the Judge, the Court, has had in scheduling matters that have to be tried in this area, but I do submit that these instructions were prepared solely because we felt that we would be given another opportunity to submit the instructions over the night, in anticipation of coming back to trial the next day, since we were advised by the Court well in advance of the time to adjourn for the evening that the matter would proceed to a conclusion, we were constrained to prepare the instructions while sitting on the courthouse steps during the recess hour, without the benefit of the library or any other device.

The Court: I again state that I waived the rule that I don't normally waive when you asked for this particular setting. I did everything in my power to move it on the day that you desired. I have cases set for tomorrow; also the case for tomorrow was set previously, and you were given the advantage of the setting for your personal convenience in returning to Pontiac, Michigan. You understand that?

Mr. Hatchett: Yes, sir.

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